

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

LAURA MCCABE, et al.,

Plaintiffs,

v.

SIX CONTINENTS HOTELS, INC.,

Defendant.

Case No. 12-cv-04818 NC

**ORDER GRANTING CLASS
CERTIFICATION AND
PRELIMINARY APPROVAL OF
CLASS ACTION SETTLEMENT**

Re: Dkt. No. 139

This case arises out of defendant's alleged policy and practice of recording calls made to its call centers without giving notice to callers. Plaintiffs sue on behalf of all California residents who called defendant, alleging that defendant's recording policies violate the California Penal Code. While plaintiffs' motion for class certification and defendant's motion for summary judgment were pending with the Court, the parties settled the case. As part of the settlement, defendant agreed to pay \$11,700,000 and to not oppose plaintiffs' motion for class certification. In addition, defendant agreed not to oppose plaintiffs' motion to amend the complaint to add a plaintiff and claim for settlement purposes.

Before the Court are plaintiffs' motions to amend the complaint, for class certification, and for preliminary approval of the class action settlement. The Court held a preliminary approval hearing on May 20, 2015. No objectors appeared.

The Court conditionally GRANTS plaintiffs' request to amend the complaint.

Case No. 12-cv-04818 NC

Because the Court finds that the proposed class meets the requirements for certification under Federal Rules of Civil Procedure 23(a) and 23(b)(3), the Court GRANTS plaintiffs' motion for class certification. Additionally, plaintiffs have made a sufficient showing for the purposes of preliminary approval, so the Court GRANTS their motion for preliminary approval of the class action settlement.

I. BACKGROUND

A. Plaintiffs' Allegations

Plaintiffs' complaint alleges that defendant Six Continents Hotels, Inc. has a policy and practice of recording and/or intercepting, without the consent of all parties, customer-initiated calls routed to certain call centers. Third Amended Complaint, Dkt. No. 139-3 at ¶ 1.¹ Defendant operates six call centers to which all calls originating from the United States were routed. *Id.* Before July 18, 2012, one center warned callers that calls could be recorded or monitored, while the other five did not. *Id.* The five call centers that did not warn callers are the subject of this lawsuit. *Id.* Plaintiffs allege that calls regarding defendant's hotels and programs, including the Priority Club Rewards, Holiday Inn Express, Crowne Plaza Hotels and Resorts, InterContinental Hotels and Resorts, Staybridge Suites Hotels, Candlewood Suites Hotels, and Hotel Indigo, all connect callers with the five relevant call centers. *Id.* at ¶ 2. Plaintiffs further allege that on or before July 18, 2012, defendant intentionally and surreptitiously recorded or monitored telephone calls made to the call centers. *Id.* at ¶ 3.

Plaintiffs alleges that defendant's policy and practice of recording and monitoring calls without consent violates California's Invasion of Privacy Act, specifically Penal Code § 632.7. *Id.* at ¶ 4. Section 632.7 prohibits the recording or monitoring a communication made from a cellular or cordless telephone without the consent of all parties to the communication. *Id.* Penal Code § 632 similarly prohibits recording or intercepting

¹ As discussed below, Section II.A., the Court grants plaintiffs' request to amend the complaint and will use the third amended complaint as the operative complaint for purposes of preliminary approval of the settlement. That complaint has been submitted on the record as Exhibit G of the settlement agreement, Dkt. No. 139-3.

1 confidential communication without the consent of all parties. *Id.*

2 Plaintiffs Laura McCabe, Latroya Simpson, and Christy Sarabia are all residents of
3 California. *Id.* at ¶ 6. Defendant is a corporation headquartered in Atlanta, Georgia and
4 systematically and continuously does business in California with California residents. *Id.*
5 Between 2010 and June 2012, each of the plaintiffs called one or more of the defendant's
6 toll-free numbers from California using either a cellular or hardwired landline phone, was
7 routed to a call center, and was not warned that her call could be recorded or monitored.
8 *Id.* at ¶¶ 14-17. Plaintiffs allege that their calls were recorded and monitored by defendant.
9 *Id.* at ¶ 17.

10 Plaintiffs bring this action under Federal Rule of Civil Procedure 23 on behalf of
11 themselves and the class, defined as "all person who, while residing or located in
12 California at any time during the applicable limitations period preceding July 8, 2012
13 original filing of this complaint and through July 18, 2012, used a cellular or cordless
14 telephone to call a toll-free telephone number operated by defendant and were recorded
15 and/or monitored by defendant surreptitiously or without disclosure." *Id.* at ¶ 19.
16 Plaintiffs also bring this action on behalf of an additional class with the same definition,
17 except individuals who used a hardwired landline telephone instead of a cellular or
18 cordless telephone. *Id.* at ¶ 20.

19 **B. Procedural History**

20 Plaintiffs McCabe and Simpson filed their initial complaint on July 8, 2012, against
21 original defendants Intercontinental Hotel Group Resources, Inc. and Intercontinental
22 Hotels of San Francisco, Inc. in Alameda County Superior Court. Dkt. No. 1. On July 20,
23 2012, plaintiffs filed their first amended complaint naming Six Continent Hotels, Inc. as a
24 defendant. *Id.* Defendants timely removed this action to federal court in September 2012.
25 *Id.* In May 2013, plaintiffs stipulated to dismiss defendants Intercontinental Hotel Group
26 Resources, Inc. and Intercontinental Hotels of San Francisco, Inc., leaving Six Continents
27 Hotels, Inc. as the only remaining defendant. Dkt. No. 54. On July 8, 2014, plaintiffs
28 moved to certify the class, which defendant contested. Dkt. Nos. 80, 88, 89. While the

1 motion for class certification was pending, on August 21, 2014, defendant moved for
 2 summary judgment. Dkt. No. 91. While both motions were pending with the Court, the
 3 parties engaged in two mediation sessions on January 22 and 30, 2015, with the Hon.
 4 Louis M. Meisinger (Ret.). Dkt. No 139, Grover Decl. at ¶ 11. The parties did not reach
 5 an agreement at the mediation sessions, but came to a settlement agreement shortly after.
 6 Dkt. No 139 at 4; Dkt. No. 132. On April 15, 2015, plaintiffs moved for this Court to (1)
 7 grant preliminary approval of the settlement; (2) conditionally grant certification of the
 8 proposed settlement class solely for the purposes of settlement; (3) approve the
 9 appointment of Heffler Claims Group as the claims administrator; (4) authorize notice
 10 pursuant to the proposed notice plan; (5) schedule a fairness and approval hearing; (6)
 11 appoint Laura McCabe, Latroya Simpson, and Christy Sarabia as settlement class
 12 representatives; and (7) appoint Eric A. Grover, Rachael G. Jung, and Scot D. Bernstein as
 13 settlement class counsel. Dkt. No. 139 at 2. Defendant did not oppose the motion. On
 14 May 20, 2015, the Court held a hearing on the motion, and subsequently asked for
 15 supplemental briefing from plaintiffs. Dkt. Nos. 144, 145.

16 **C. Jurisdiction**

17 This case was removed from state court by defendants under 28 U.S.C. § 1332(d),
 18 the Class Action Fairness Act. Dkt. No. 1 at 2. The plaintiffs and proposed class members
 19 are California residents. *Id.* at 3. Defendant is incorporated in Delaware with a principal
 20 place of business in Georgia. *Id.* The amount in controversy exceeds \$5 million. *Id.*
 21 Therefore, the Court has jurisdiction under the Class Action Fairness Act. All parties have
 22 consented to magistrate judge jurisdiction. Dkt. Nos. 7, 8.

23 **D. Overview of the Class Settlement Agreement**

24 **1. Class Definition**

25 The settlement agreement defines the class as, “All persons who, while residing or
 26 located in California, placed a call to one of Defendant’s toll-free telephone numbers at
 27 any time during the period from March 1, 2011 through July 18, 2012, inclusive, and
 28 spoke with a representative.” Dkt. No. 139-1 at ¶ 1(h). Based on defendant’s records of

unique telephone numbers with California area codes made to defendant's toll-free numbers, the parties estimate approximately 698,000 individuals in the class. *Id.* at ¶ 1(h), 6.1.

2. Monetary Payment to the Class

Under the settlement, defendant will pay the sum of \$11,700,000. *Id.* at ¶ 3.1. Those class members who have submitted approval claims will receive an equal part of the \$11,700,000 payment after administration costs, attorneys' fees and costs, and the class representatives' awards have been deducted from this amount, up to a maximum payment of \$5,000 per person. *Id.* at ¶ 3.5.

The settlement further provides that, in the event that all class members are paid the maximum \$5,000 award, and there is additional settlement money available; or, in the event that any check to a claimant is uncashed 90 days after distribution, the unused funds will be turned over in equal parts to Electronic Frontier Foundation and Consumer Action, San Francisco-based non-profits that provide advocacy and education on behalf of consumers. *Id.* at ¶ 3.5.

3. Incentive Awards, Attorneys' Fees and Costs, and Administration Costs

Under the settlement agreement, the \$11,700,000 payment includes all attorneys' fees and costs, administration costs, and the class representatives' awards approved by the Court. *Id.* at ¶ 6.1. The settlement agreement provides that the class representatives will receive a maximum award of \$15,000 each to McCabe and Simpson and \$7,500 to Sarabia. *Id.* at ¶ 3.3. Class counsel may seek an award of attorneys' fees no more than \$3,510,00, which is 30% of the gross settlement amount, and costs not to exceed \$100,000. *Id.* at ¶ 3.2. The settlement agreement provides that defendant may not oppose the cost request or an attorneys' fee request of 25% of the gross settlement amount or less. *Id.* at ¶ 3.2. The settlement agreement also allocates \$500,000 for a claims administrator's costs of providing notice to the settlement class and administering the settlement. *Id.* at ¶¶ 3.4, 4.1, 4.2.

4. Release of Claims

The settlement agreement further provides that, upon final entry of the court, the following release applies:

The Settlement Class Representatives and each Settlement Class Member, and their respective heirs, assigns, successors, agents, attorneys, executors, and representatives, shall be deemed to have and by operation of this agreement and the final approval order and judgment shall have fully, finally, irrevocably, and forever released Six Continent Hotels, Inc. and its past or present direct and indirect parents, affiliates and subsidiaries (whether or not wholly owned) and their respective directors, officers, employees, agents, insurers, shareholders, members, attorneys, advisors, consultants, representatives, partners, affiliates, related companies, parents, subsidiaries (whether or not wholly owned), joint ventures, independent contractors, vendors, wholesalers, resellers, distributors, retailers, clients, divisions, franchisees, licensees, predecessors, successors, and assigns and each of them (collectively, the "Released Parties") from any and all liabilities, claims, causes of action, damages (whether actual, compensatory, statutory, punitive or of any other type), penalties, costs, attorneys' fees, losses, or demands, whether known or unknown, existing or suspected or unsuspected, that were or reasonably could have been asserted based on the factual allegations contained in the Action, or relate to or arise out of the alleged recording, monitoring, eavesdropping upon telephone calls made to Defendant or any other Released Parties prior to July 19, 2012 (collectively, the "Released Claims"). The Released Claims include, but are not limited to, claims that were or reasonably could have been asserted based on the factual allegations contained in the Action alleging violation of any law prohibiting or regulating the monitoring, recording, or eavesdropping on telephonic calls without the consent of all parties, including but not limited to any claims under California Penal Code §§ 631, 632, 632.7, 637.2. The Released Claims also include but are not limited to claims under any other California or federal statute, code, rule or regulation that regulates or restricts the monitoring, recording or eavesdropping on telephone calls.

Dkt. No. 139-2 at ¶ 11. Additionally, the settlement class members waive their rights under California Civil Code § 1542. *Id.* at ¶ 11.2.

5. Class Notice

The settlement agreement provides for a notice procedure that includes notification via U.S. mail, email, a settlement website, an online banner program, newspaper publication, and press release. Dkt. No. 139 at ¶¶ 6.1-6.8. Defendant will compile a list of

1 the unique telephone numbers associated with telephone calls to defendant from California
2 area codes that were routed to one of its call centers during the class period. Defendant
3 estimates the list will be approximately 698,000 unique phone numbers, which it will
4 cross-reference through its databases to search for names, mailing addresses, and
5 additional telephone numbers. The contact information for potential class members will be
6 provided to the claims administrator.

7 **II. DISCUSSION**

8 **A. Amended Complaint**

9 As part of the settlement agreement, the parties agreed that plaintiffs will seek the
10 Court's permission to file a third amended complaint which adds a named plaintiff, Christy
11 Sarabia, and a cause of action for violation of California Penal Code § 632, which covers
12 the recording of confidential communications without consent. Dkt. No. 139-2 at ¶ A.

13 The settlement agreement provides that the defendant stipulates to amend the
14 complaint only for settlement purposes, but does not stipulate to the amendment if
15 settlement is not approve or is defeated by its own terms. Dkt. No. 139-2 at ¶ 2.4.
16 However, plaintiffs ask the Court to appoint Sarabia as a settlement class representative as
17 part of the preliminary approval. Dkt. No. 139 at 14-15. Additionally, the settlement
18 release includes a release of California Penal Code § 632 claims. Dkt. No. 139-2 at ¶ 11.

19 Federal Rule of Civil Procedure 15(a)(2) permits a plaintiff to amend its pleading
20 with the opposing party's written consent. Where the parties have agreed to file an
21 amended complaint as part of the class settlement, judges in this district have granted leave
22 to amend, subject to the terms of settlement. *See Miller v. Ghirardeli Chocolate Co.*, 12-
23 cv-04936 LB, 2014 WL 4978433, at *7 (N.D. Cal. Oct. 2, 2014) (granting leave to amend
24 for settlement purposes, but voiding the amendment if no final settlement occurs); *Harris*
25 *v. Vector Mktg. Corp.*, 08-cv-5198 EMC, 2011 WL 1627973, at *6 (N.D. Cal. Apr. 29,
26 2011) (approving stipulation and granting leave to amend complaint as part of order
27 granting preliminary approval); *see also Ching v. Siemens Indus. Inc.*, 11-cv-4838 MEJ,
28 2013 WL 6200190, at *8 (N.D. Cal. Nov. 27, 2013)(same).

1 Because provisions of the settlement agreement require the Court to consider
2 content exclusively pled in the third amended complaint, the Court finds it necessary to
3 grant plaintiffs' motion to amend the complaint at this time. In the event that the proposed
4 settlement is not finally approved by the Court, or in the event that the settlement
5 agreement becomes null and void pursuant to its terms, the third amended complaint will
6 be dismissed. In that event, the second amended complaint will be the operative pleading.

7 The Court's following analysis of class certification and preliminary settlement
8 approval will be based on the plaintiffs and claims presented in the third amended
9 complaint.

10 **B. Conditional Class Certification**

11 Class certification requires that: (1) the class be so numerous that joinder of all
12 members individually is impracticable; (2) there are questions of law or fact common to
13 the class; (3) the claims or defenses of the class representative must be typical of the
14 claims or defenses of the class; and (4) the person representing the class must be able fairly
15 and adequately to protect the interests of all members of the class. Fed. R. Civ. P. 23(a);
16 *Staton v. Boeing*, 327 F.3d 938, 953 (9th Cir. 2003).

17 In addition to meeting the conditions imposed by Rule 23(a), the parties seeking
18 class certification must also show that the action is maintainable under Federal Rule of
19 Civil Procedure 23(b). Plaintiffs here are seeking certification under Rule 23(b)(3). Dkt.
20 No. 139 at 13. Plaintiffs assert that the action is maintainable under Rule 23(b)(3) which
21 allows a class action to be certified if "the court finds that the questions of law or fact
22 common to class members predominate over any questions affecting only individual
23 members, and that a class action is superior to other available methods for fairly and
24 efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b); *Hanlon v. Chrysler Corp.*,
25 150 F.3d 1011, 1022 (9th Cir. 1998).

26 Here, plaintiffs ask the Court to conditionally grant certification of the proposed
27 settlement class, solely for the purposes of settlement. Dkt. No. 132 at 9.

28 /

1. Numerosity

Here, the numerosity requirement has been satisfied. The defendant has already reviewed its records and identified a potential class, based on unique telephone numbers associated with telephone calls to defendant from California area codes that were routed to one of its call centers during the class period. Dkt. No. 139-2 at ¶ 1(h), 6.1. The parties estimate approximately 698,000 individuals in the class. *Id.* at ¶ 1(h), 6.1. Joinder of all individuals would be impracticable.

2. Commonality

Here, there are questions of fact and law common to all class members, the answers to which will drive the resolution of the litigation. *See Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011). Plaintiffs contend that all settlement class members were illegally recorded when they called defendant's call centers, while residing or located in California. Plaintiffs assert that defendant's uniform practices and policies violated California Penal Code §§ 632 and 632.7, creating a question of law and fact common to all settlement class members. Dkt. No. 139 at 21. All settlement class members seek the same legal remedies under Penal Code § 637.2. *Id.*; Grover Decl. at ¶ 40.

3. Typicality

The class representatives' claims are typical of those of the class. For purposes of the typicality inquiry, the named plaintiffs' injuries need not be identical with those of the other class members, "only that the unnamed class members have injuries similar to those of the named plaintiffs and that the injuries result from the same, injurious course of conduct." *Armstrong v. Davis*, 275 F.3d 849, 869 (9th Cir. 2001). Here, this requirement is met as all of the named plaintiffs have made calls during the class period to the defendant's toll-free customer-service lines from a telephone while located in California, reached a representative of defendant, and had their calls recorded allegedly without their consent. Dkt. No. 139-3. Named plaintiffs claim the same injury as the proposed settlement class, thus the typicality requirement is satisfied.

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4. Conflicts of Interest

Proposed class representatives and their counsel cannot have conflicts of interest with the class and must vigorously prosecute the action on behalf of the class. *Hanlon*, 150 F.3d at 1020. Prior to settlement, this case was at an advanced stage in litigation with motions for class certification and summary judgment pending before the Court. Dkt. Nos. 80, 90, 91. Plaintiffs assert that named plaintiffs will aggressively and competently assert the interests of the settlement class members because they have retained competent counsel that is experienced in litigating class action, including those in the context of alleged violations of the California Invasion of Privacy Act. Dkt. No. 139 at 22. The Court finds that the named plaintiffs and their counsel will fairly and adequately protect the interests of the class.

5. Rule 23(b)(3)

Rule 23(b)(3) requires that the common legal and fact questions represent a significant aspect of the case, and do not appear to be outweighed by any questions affecting only individual members. *See Hanlon*, 150 F.3d at 1022 (“When common questions present a significant aspect of the case and they can be resolved for all members of the class in a single adjudication, there is clear justification for handling the dispute on a representative rather than on an individual basis.” (quoting 7A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice & Procedure* § 1778 (2d ed. 1986))).

Here, the common question is whether defendant had policies and practices of recording or monitoring telephone calls to defendant’s call centers without the knowledge and consent of callers. Dkt. No. 132 at 33. The same question is presented in class representatives’ claims.

Additionally, considerations of judicial economy favor litigating this case as a class action. As this case involves hundreds of thousands of claims for a statutory maximum recovery of \$5,000, a class action is superior to an alternative method for adjudicating the plaintiffs’ claims. *See Culinary/Bartender Trust Fund v. Las Vegas Sands, Inc.*, 244 F.3d 1154, 1163 (9th Cir. 2001) (“[I]f plaintiffs cannot proceed as a class, some-perhaps most-

will be unable to proceed as individuals because of the disparity between their litigation costs and what they hope to recover.”). According to the record provided, no potential class member has expressed a desire to proceed independently and no unusual obstacles have appeared that would make managing the class particularly difficult.

The Court finds that this action is maintainable under Federal Rule of Civil Procedure 23(a) and (b)(3), and therefore, certifies the following class: all persons who, while residing or located in California, placed a call to one of Defendant’s toll-free telephone numbers at any time during the period from March 1, 2011 through July 18, 2012, inclusive, and spoke with a representative. The Court approves the named plaintiffs, Laura McCabe, Latroya Simpson, and Christy Sarabia as class representatives. Additionally, the Court appoints Eric A. Grover, Rachael G. Jung, and Scot D. Bernstein as class counsel.

C. Preliminary Approval of the Settlement

Federal Rule of Civil Procedure 23(e) requires judicial approval of any settlement by a certified class. Although there is a “strong judicial policy that favors settlements, particularly where complex class action litigation is concerned,” *Linney v. Cellular Alaska P’ship*, 151 F.3d 1234, 1238 (9th Cir. 1998), “[t]he purpose of Rule 23(e) is to protect the unnamed members of the class from unjust or unfair settlements affecting their rights.” *In re Syncor ERISA Litig.*, 516 F.3d 1095, 1100 (9th Cir. 2008). Accordingly, a settlement should only be approved if it is “fundamentally fair, adequate, and reasonable.” *Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1375 (9th Cir. 1993) (internal quotation marks omitted). In determining whether the proposed settlement meets this standard, the Court does not have the ability “to delete, modify, or substitute certain provisions. . . . The settlement must stand or fall in its entirety.” *Id.* Due to the dangers of collusion between class counsel and the defendant, as well as the need for additional protections when the settlement is not negotiated by a Court-designated class representative, settlement approval that takes place prior to formal class certification requires a higher standard of fairness. *Hanlon*, 150 F.3d at 1026.

1 “The Court may grant preliminary approval of a settlement and direct notice to the
2 class if the settlement: (1) appears to be the product of serious, informed, non-collusive
3 negotiations; (2) has no obvious deficiencies; (3) does not improperly grant preferential
4 treatment to class representatives or segments of the class; and (4) falls within the range of
5 possible approval.” *Harris v. Vector Mktg. Corp.*, No. 08-cv-05198 EMC, 2011 WL
6 1627973, at *7 (N.D. Cal. Apr. 29, 2011); *In re Tableware Antitrust Litig.*, 484 F. Supp. 2d
7 1078, 1079 (N.D. Cal. 2007). The Court reviews the preliminary approval factors in turn.

8 **1. The Settlement Process**

9 The Court first considers the means by which the parties reached their settlement.
10 While motions for class certification and summary judgment were pending with the Court,
11 the parties engaged in two mediation sessions on January 22 and 30, 2015, with the Hon.
12 Louis M. Meisinger (Ret.) where the parties set out the broad outlines of an agreeable
13 settlement. Dkt. No 139, Grover Decl. at ¶ 11. The parties did not reach an agreement at
14 the mediation sessions, but came to a settlement agreement shortly after. Dkt. No 139 at 4;
15 Dkt. No. 132. Additionally, the parties engaged in adversarial motion practice, as well as
16 discovery during the 28 months the case was ongoing in federal court. The settlement
17 appears to be the product of serious, informed, non-collusive negotiations. However, the
18 Court notes that the plaintiffs’ motion is unclear whether the final settlement agreement
19 was overseen by the private mediator, and whether class representatives were involved in
20 the settlement negotiations. *See* Dkt. No. 139 at 11, 29. The Court is cautious about the
21 possibility of collusive negotiations occurring and expects the parties to provide further
22 information in their motion for final approval.

23 **2. The Presence of Obvious Deficiencies**

24 The Court must next analyze whether there are obvious deficiencies in the
25 settlement agreement. The Court previously ordered plaintiffs to submit additional
26 information to clarify the settlement agreement. Dkt. No. 145. Having reviewed the
27 supplemental information, the Court finds there are no obvious deficiencies in the
28 settlement agreement.

1 First, the class definition and amended complaint are appropriate for the purposes of
2 settlement, as discussed above.

3 Second, the scope of release is broad, and releases defendant's "affiliates,"
4 "vendors," and "independent contractors," among other entities related to defendant. Dkt.
5 No. 139-2 at ¶ 11. The Court asked the parties to clarify which defendant entities are
6 included and to provide a plain language version of the release, accessible to the public.
7 Dkt. No. 145. The parties submitted clarification, simplifying the release language into a
8 shorter and more direct statement so potential class members can be informed as to the
9 scope of the release. Dkt. No. 146. While the scope of release is broad, it is acceptable
10 because the claims released are limited to those facts that "relate to or arise out of the
11 alleged recording, monitoring, eavesdropping upon telephone calls made to Defendant or
12 any other Released Parties prior to July 19, 2012." Dkt. No. 139-2 at ¶ 11; *see Hesse v.*
13 *Sprint Corp.*, 598 F.3d 581, 590 (9th Cir. 2010) ("A settlement agreement may preclude a
14 party from bringing a related claim in the future even though the claim was not presented
15 and might not have been presentable in the class action, but only where the released claim
16 is based on the identical factual predicate as that underlying the claims in the settled class
17 action.") (internal quotation marks and citations omitted).

18 Third, the parties' designated *cy pres* beneficiaries, Consumer Action and
19 Electronic Frontier Foundation, would equally split any class funds remaining after all
20 class funds are distributed per capita to class member up to a maximum of \$5,000. The
21 designated *cy pres* recipient appears to meet the requirements for approval set forth in
22 *Dennis v. Kellogg Co.*, 697 F.3d 858, 865 (9th Cir. 2012) (holding that there must be "a
23 driving nexus between the plaintiff class and the *cy pres* beneficiaries" and that the *cy pres*
24 award must be "guided by (1) the objectives of the underlying statute(s) and (2) the
25 interests of the silent class members, . . . and must not benefit a group too remote from the
26 plaintiff class"). The motion for preliminary class approval did not contain information
27 sufficient for the Court to determine whether the recipients were appropriate. Dkt. No.
28 139. Additionally, the Court expressed concern at the hearing that the *cy pres* beneficiaries

1 are national organizations, while the class is limited to California residents. In
2 supplemental briefing, the parties provided the Court with sufficient information to
3 determine that the beneficiaries are consumer action organizations, guided by the
4 objectives of the underlying statutes, to protect consumer privacy. Dkt. No. 146.
5 Additionally, the parties proffered that if any settlement fund is given to a *cy pres*
6 beneficiary, it will be designated for use on behalf of California consumers.

7 Fourth, the settlement agreement provides that, subject to court approval, class
8 representatives McCabe and Simpson will each receive a \$15,000 enhancement award,
9 class representative Sarabia will receive a \$7,500 enhancement award, and class counsel
10 may seek up to 30% of the class settlement fund in attorneys' fees. The settlement
11 agreement covers the cost of settlement administration, which plaintiffs estimate will be
12 \$500,000.

13 While the Court is not approving the requested attorneys' fees and costs at this
14 stage, the Court notes that class counsel must support these requests with affidavits and
15 documents that demonstrate such requests are reasonable, given the time spent on the
16 litigation. Additionally, the motion for preliminary approval contains little information
17 regarding the involvement of class representatives or justifying an enhancement award for
18 class representatives potentially above the statutory maximum value of their claims.
19 Finally, the costs of administering the settlement must also be supported by appropriate
20 documentation. The motion for final approval must address these issues.

21 Accordingly, the lack of obvious deficiencies in the revised settlement agreement
22 weighs in favor of granting preliminary approval.

23 3. Preferential Treatment

24 The third factor the Court considers is whether the settlement agreement provides
25 preferential treatment to any class member. Under the settlement, the monetary recovery
26 will be distributed to class members who have submitted approved claims pro rata after
27 deduction of the attorneys' fees, costs, class representative awards, and administration
28 costs. A class member can recover up to the statutory maximum \$5,000. The settlement

provides for an enhancement award of \$15,000 for class representatives McCabe and Simpson, and an award of \$7,500 for class representative Sarabia.

Incentive awards for class representatives, should the Court finally approve them, does not render the settlement unfair, as “the Ninth Circuit has recognized that service awards to named plaintiffs in a class action are permissible and do not render a settlement unfair or unreasonable.” *Harris*, 2011 WL 1627973, at *9 (citing *Staton*, 327 F.3d at 977). While the Court is not approving the amount of the incentive award at this stage, the Court notes that the proposed incentive awards here are on the high end. *See Spalding v. City of Oakland*, No. 11-cv-02867 TEH, Dkt. No. 99 (N.D. Cal. Sept. 9, 2013) (approving \$9,000 incentive award); *Covillo v. Specialtys Cafe*, No. 11-cv-00594 DMR, 2014 WL 954516, at *8 (N.D. Cal. Mar. 6, 2014) (approving \$8,000 incentive award); *Barel v. Bank of Am.*, 255 F.R.D. 393, 402 (E.D. Pa. 2009) (approving \$10,000 incentive award). Additionally, the incentive awards are significantly greater than the \$5,000 statutory maximum recovery, so class representatives may be receiving more than their expected recovery in the lawsuit. At the final approval stage, the plaintiffs must demonstrate why the enhancement awards are reasonable, especially in light of a statutory maximum recovery for the settled claims.

The Court finds no indication of unfair treatment to certain members of the class, and therefore, this factor supports preliminary approval.

4. Whether the Settlement Falls Within the Range of Possible Approval.

Finally, the Court must determine whether the proposed settlement falls within the range of possible approval. “To evaluate the range of possible approval criterion, which focuses on substantive fairness and adequacy, courts primarily consider plaintiff’s expected recovery balanced against the value of the settlement offer.” *Harris*, 2011 WL 1627973, at *9 (quoting *Vasquez v. Coast Valley Roofing, Inc.*, 670 F. Supp. 2d 1114, 1125 (E.D. Cal. 2009)). To determine whether an agreement is fundamentally fair, adequate, and reasonable, the Court may preview the factors that ultimately inform final approval: “[1] the strength of plaintiff’s case; [2] the risk, expense, complexity, and likely

duration of further litigation; [3] the risk of maintaining class action status throughout the trial; [4] the amount offered in settlement; [5] the extent of discovery completed, and the stage of the proceedings; [6] the experience and views of counsel; [7] the presence of a governmental participant; and [8] the reaction of the class members to the proposed settlement.” *Id.* at *9 (citing *Churchill Village v. Gen. Elec.*, 361 F.3d 566, 575 (9th Cir. 2004)). As part of this assessment, the Court must “compare the value of the settlement against the expected recovery at trial” by estimating “the maximum amount of damages recoverable in a successful litigation and compare that with the settlement amount.” *Id.* at *11 (internal quotation marks omitted). The Court will first address the value of the settlement.

a. The Value of the Settlement.

The full value of the settlement is \$11,700,000 to resolve the claims covered by the settlement. Dkt. No. 139-3 at ¶ 3.1. With an class size of 698,000, per capita recovery is estimated at \$16.76 per settlement class member. Grover Decl. at ¶ 16. Subtracting the administration costs, proposed enhancement awards, and proposed attorneys’ fees and costs, the net settlement fund will be approximately \$7,552,500. *Id.* at ¶ 3.4. If all proposed awards are granted by the Court, and all class member submitted claims, each class member would receive an award of \$10.82.

Plaintiffs argue that this represents a fair and reasonable settlement because the gross per capita recovery is within the range of settlements approved in recent phone recording settlements that received final approval. Dkt. No. 139 at 19; *see Skuro v. BMW of North America, LLC*, 10-cv-8672 GW, Dkt. No. 56 (C.D. Cal. Aug. 28, 2012) (settlement of \$7.50 per class member); *Marenco v. Visa Inc.*, 10-cv-8022 DMG, Dkt. No. 54 (C.D. Cal. Nov. 30, 2011) (settlement of \$30 per class member); *Batmanghelich v. Sirius XM Radio, Inc.*, 09-cv-9190 VBF, Dkt. No. 89 (C.D. Cal. Sept. 15, 2011) (settlement of \$5.77 per class member); *Nader v. Capital One Bank, N.A.*, 12-cv-01265 DSF, Dkt. No. 170 (C.D. Cal. Nov. 17, 2014) (settlement of \$2.73 per class member); *Cohorst v. BRE Properties, Inc. et. al.*, 10-cv-2666 JM, 2012 WL 153754 (S.D. Cal. Jan.

1 18, 2012) (settlement of \$4.70 per class member); *Knell v. FIA Card Services*, 12-cv-
2 00426 WVG, Dkt. No. 79 (S.D. Cal. Aug. 15, 2014) (settlement of \$0.75 per class
3 member); *Hoffman v. Bank of America, N.A.*, 12-cv-00539 DHB, Dkt. No. 67 (S.D. Cal.
4 Nov. 6, 2014) (settlement of \$1.86 per class member).

5 Additionally, plaintiffs argue that recovery per class member will actually be higher
6 because, “at a strong 10% claims rate,” each settlement class member who filed a claim
7 would receive over \$100. Dkt. No. 139 at 21. The Court notes that the per capita recovery
8 represents 0.3% of the statutory maximum recovery. Even the \$100 estimate of actual
9 recovery by each class member who files a claim represents only 2% of the statutory
10 maximum recovery. The Court finds the value of the settlement to be low compared to the
11 potential recovery, but in light of other approved settlements within a similar range, this
12 factor is not dispositive in the Court’s analysis. Therefore, the Court turns to the
13 remaining factors.

14 **b. The Remaining Factors.**

15 The Court considers together the remaining factors, such as the strength of the
16 plaintiffs’ case, the extent of discovery completed at this stage of the proceedings, the risk
17 of maintaining class action status, and the risk, expense, and likely duration of the
18 litigation. The Court finds that all weigh in favor of preliminary approval of the proposed
19 settlement agreement.

20 Plaintiffs assert that it is not certain they would prevail at maintaining class action
21 status and prove liability to the class. Dkt. No. 139 at 20-22. Plaintiffs assert that
22 defendant maintains that a variety of factual issues precluded both class certification and
23 liability, including which potential class members called Six Continents, the callers’
24 residency, their location at the time of the call, which calls were made from cordless
25 telephones, whether a particular call was recorded, whether the caller consented to the
26 recording, what type of device was used to answer the call, and whether a particular call
27 was made during the limitations period. Dkt. No. 88. Additionally, defendant raised
28 defenses to the merits of the claims, which may have precluded some of plaintiffs’ claims.

1 Dkt. No. 91-1. As a result, if litigation were to continue, plaintiffs would have invested
2 significant time and money to further investigate the class claims and maintain class
3 certification. Dkt. No. 139 at 18. The Court notes that the plaintiffs' and defendant's
4 disagreements are not speculative, but in fact, the parties had briefed class certification
5 motions and a motion for summary judgment prior to settlement.

6 Plaintiffs also assert that it is too expensive and risky for an individual plaintiff to
7 pursue a claim outside of a certified class, considering the statutory maximum recovery of
8 \$5,000 per violation. *Id.* Plaintiffs assert that defendant produced responses to plaintiffs'
9 multiple sets of written discovery and produced over 11,000 pages of relevant documents.
10 Dkt. No. 139, Grover Decl. ¶¶ 9, 11, 33. Plaintiffs took six depositions and defendant
11 deposed three plaintiffs, a fact witness, and three experts. *Id.* Therefore, plaintiffs assert,
12 they not only engaged in significant discovery, but also could evaluate class damages and
13 make informed decisions regarding settlement. Dkt. No 139 at 21-22.

14 Finally, plaintiffs argue that the settlement ensures timely relief and substantial
15 recovery of the amounts that plaintiffs contend are owed to the proposed settlement class.
16 *Id.* at 19. If litigation were to proceed, plaintiffs would still have to prevail on their
17 pending class certification motion, defeat defendant's summary judgment motion, establish
18 class-wide liability, and prove damages. *Id.* Plaintiffs argue that these efforts would take
19 years, impose additional cost, risks, and further delay. *Id.*

20 The Court finds that the remaining factors weigh in favor of granting preliminary
21 approval. Additionally, the Court finds that the low recovery value is fair and reasonable,
22 considering all the factors, because the high cost of litigation, the significant risks to the
23 plaintiffs, and the low statutory recovery value would make individual pursuit of a lawsuit
24 impractical. Thus, the plaintiffs' motion for preliminary approval of the settlement is
25 GRANTED.

26 **D. Class Notice**

27 "The court must direct notice in a reasonable manner to all class members who
28 would be bound by the proposal." Fed. R. Civ. P. 23(e)(1).

1. Notice Administration

Plaintiffs ask the Court to appoint Heffler Claims Group LLC (“Heffler”) as the Claim Administrator. Dkt. No. 132. Plaintiffs have provided the Court with the declaration of Jeanne C. Finegan, the President of HF Media, LLC, a division of Heffler. Dkt. No 139-6. Finegan attests that Heffler has provided class action settlement services in more than 900 cases over the past 45 years. *Id.* at ¶ 4. Finegan personally has served as an expert, directly responsible for the design and implementation of hundreds of class action notice programs. *Id.* at ¶ 6. Heffler has proposed a notice program that is targeted to reach 70 percent of persons over the age of 18 who live in or are located in California 1.6 times. *Id.* at ¶ 15. The plaintiffs estimate that the cost of settlement administration is \$500,000, approximately 4.3% of the gross settlement amount. The Court finds that Heffler is an appropriate claims administrator and APPOINTS Heffler to administer the class notice. The Court notes that the estimated cost of settlement administration has not been supported by documentation or legal arguments beyond the assertion that it is reasonable given the class size. Dkt. No. 139 at 18. At the final approval stage, plaintiffs must provide further documentation and argument to support the settlement administration costs.

2. Method of Providing Notice

Plaintiffs and Heffler have planned an extensive notice program to reach the estimated 698,000 class members. Heffler will take a two-step approach to reaching potential class members: (1) Heffler will contact known class plaintiffs; and (2) Heffler will attempt to access members of the general public who may be class plaintiffs. Dkt. No. 139-6 at 13.

First, defendant will compile a list of unique telephone numbers associated with telephone calls to defendant from California area codes that were routed to one of its call centers during the class period, March 1, 2011, through July 18, 2012. Dkt. No. 139, Exh. 1 at ¶ 6.1. Defendant will cross-reference the telephone numbers with its customer-related databases to search for names, mailing addresses, and additional telephone numbers or email addresses. *Id.* Defendant will also run searches of its customer-related databases to

1 locate contact information for individuals with a California mailing address from January
2 1, 2010, to December 31, 2012. *Id.* No later than 45 days after the Court enters its order
3 preliminarily approving settlement, defendant will provide the potential class member list
4 to Heffler. *Id.* at ¶ 6.2. Heffler will also run reverse directory searches on the phone
5 numbers from defendant to obtain names and mailing addresses associated with each
6 telephone number. *Id.* No later than 75 days after the Court's order, Heffler will mail a
7 postcard settlement class notice to each settlement class member with an identified mailing
8 address. *Id.* at ¶ 6.3.

9 Second, to reach the general public, Heffler will create a variety of public notices.
10 It will issue a press release of the settlement. *Id.* at ¶ 6.5; Dkt. No 139-3 at Exh. F.
11 Between 75 and 90 days after the Court's order, Heffler will publish a notification of the
12 settlement in a variety of newspapers distributed in California, as well as Parade magazine.
13 *Id.* Additionally, Heffler will use targeted Facebook and online banner ads. Dkt. No. 146-
14 1.

15 Within 50 days of the Court's order, Heffler will publish a website on the internet
16 that will provide a summary of the terms of the settlement, instructions on how settlement
17 class members may communicate with the claims administrator, frequently asked
18 questions and answers, and claim forms. Dkt. No. 139 at 15. The website will also have
19 downloadable court documents with the settlement agreement and this order included. *Id.*

20 3. Content of the Notice

21 Federal Rule of Civil Procedure 23 requires that "[t]he notice must clearly and
22 concisely state in plain, easily understood language: (i) the nature of the action; (ii) the
23 definition of the class certified; (iii) the class claims, issues, or defenses; (iv) that a class
24 member may enter an appearance through an attorney if the member so desires; (v) that the
25 court will exclude from the class any member who requests exclusion; (vi) the time and
26 manner for requesting exclusion; and (vii) the binding effect of a class judgment on
27 members under Rule 23(c)(3)." Fed. R. Civ. P. 23(c)(2)(B).

28 Plaintiffs have provided the various notices for the Court's review and approval.

1 Dkt. Nos. 139, 146. Initially, the Court ordered plaintiffs to submit the smaller notices that
2 they intended to use, such as Facebook and banner ads, to ensure the notices provided
3 sufficient information. Dkt. No. 145. The Court also suggested altering the appearance
4 and language of some notices to ensure that they were accessible. *Id.* After reviewing the
5 notices, the Court finds that they all provide sufficient information as to the nature of the
6 action, the class claims, and access to further information. Dkt. No. 146-1. Most of the
7 notices provide the class definition, the release language, and details on obtaining an
8 attorney, submitting a claim, or opting out. Those notices that are too small to contain all
9 of the necessary information required by Rule 23 have links to the class website, which
10 does contain all of the information. The website also provides information regarding the
11 time and place of the final approval hearing, the attorneys' fees and class representatives'
12 incentive awards, and contact information to the claims administrator for further questions.

13 Thus, the Court concludes that the notices contain the required information and
14 overall provide reasonable notice to the class members.

15 **E. Schedule**

16 The parties propose the following schedule below, Dkt. No. 139-2, which the Court
17 ADOPTS in full:
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1	Last day for defendant to provide Heffler with potential class member contact list	August 14, 2015
2		
3	Last day for Heffler to publish settlement website	August 19, 2015
4		
5	Last day for Heffler to mail and email the settlement notice to class members	September 14, 2015
6		
7	Dates of online banner publication notice	August 19, 2015 - December 13, 2015
8	Dates of newspaper publication notice	September 13, 2015 – September 28, 2015
9	Last day for class counsel to file motion for award of attorneys' fees, litigation costs, administration costs, and class representative's service payment	November 27, 2015
10		
11		
12	Last day for claims to be submitted by class member	December 13, 2015
13		
14	Last day for requests for exclusion from the settlement to be postmarked by class members	December 13, 2015
15		
16		
17	Last day for class members to file objections to the settlement	December 13, 2015
18		
19	Last day for class counsel to file motion for final approval of settlement	December 22, 2015
20		
21	Last day for the parties to reply to any objections filed by class members	January 1, 2016
22		
23	Hearing on motion for final approval of settlement, class representative's incentive award, and application for attorneys' fees and costs	February 3, 2016 at 1:00 p.m. in the San Francisco Courthouse.
24		
25		
26		

United States District Court
Northern District of California

III. CONCLUSION

The Court GRANTS plaintiffs' request to amend the complaint as proposed in the settlement agreement, conditionally for the purposes of settlement only. Defendant must answer the third amended complaint within 14 days. The Court CERTIFIES the proposed class, GRANTS preliminary approval of the settlement agreement, and APPROVES the proposed method of notice. The Court also APPROVES the proposed class counsel and class representatives.

The Court will hold a final approval hearing on February 3, 2016, at 1:00 p.m. in Courtroom D, 15th Floor, U.S. District Court, 450 Golden Gate Avenue, San Francisco, California.

IT IS SO ORDERED.

Dated: June 30, 2015



NATHANAEL M. COUSINS
United States Magistrate Judge

United States District Court
Northern District of California